

STATE OF SOUTH CAROLINA

(Caption of Case)

BellSouth Telecommunications, Inc. d/b/a AT&T  
Southeast d/b/a AT&T South Carolina, Complainant/  
Petitioner v. dPi Teleconnect, LLC, Defendant/  
Respondent

BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

COVER SHEET

DOCKET  
NUMBER: 2010 - 18 - C

(Please type or print)

Submitted by: John J. Pringle, Jr.

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition

☐ Request for item to be placed on Commission's Agenda expeditiously

☐ Other:

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)			
<input type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request	
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification	
<input type="checkbox"/> Electric/Telecommunications	<input checked="" type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation	
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement	
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment	
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter	
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response	
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery	
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition	
<input checked="" type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation	
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena	
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff	
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other: _____	
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest		
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit		
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report		

Print Form

Reset Form

# ELLIS:LAWHORNE

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February 25, 2010

## **FILED ELECTRONICALLY**

The Honorable Jocelyn G. Boyd  
Clerk  
**South Carolina Public Service Commission**  
PO Drawer 11649  
Columbia SC 29211

RE: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a  
AT&T South Carolina, Complainant/Petitioner v. dPi Teleconnect, LLC,  
Defendant/Respondent  
**Docket No. 2010-18-C, Our File No. 536-11714**

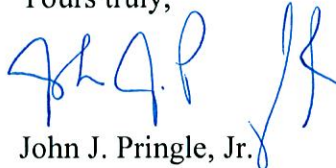
Dear Jocelyn:

Enclosed is the **Answer and Counterclaim** filed on behalf of dPi Teleconnect, LLC in the above-referenced docket.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Yours truly,



John J. Pringle, Jr.

JJP/cr

Enclosure

cc: C. Lessie Hammonds, Esquire (via electronic mail service)  
Patrick W. Turner (via electronic mail service)  
Henry M. Walker, Esquire (via electronic mail service)  
Christopher Malish (via electronic mail service)  
Gordon D. Polozola, Esquire (via electronic mail service)  
Paul F. Guarisco, Esquire (via electronic mail service)  
Mr. Jim R. Dry (via electronic mail service)

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

<b>In the matter of:</b>	)	
	)	
<b>BellSouth Telecommunications, Inc.</b>	)	<b>Docket No. 2010-18-C</b>
<b>d/b/a AT&amp;T Southeast d/b/a AT&amp;T South Carolina v.</b>	)	
<b>dPi Teleconnect, L.L.C.</b>	)	

**ANSWER and COUNTERCLAIM of dPi TELECONNECT, L.L.C.**

dPi Telecommunications, L.L.C. (“dPi”) hereby answers the complaint filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina (“AT&T”) and brings a related counterclaim.

**dPi’s ANSWER**

1. In response to the specific allegations set forth in the Complaint, all allegations not specifically admitted are denied.
2. Generally, dPi has never applied for the “Word of Mouth” promotions, and in connection with the other promotions, has never withheld payment of the difference between the full amount of a cash back promotion (which dPi is actually entitled to) and the amount actually credited by AT&T/BellSouth (the promotional amount less the wholesale discount).
3. dPi responds in more detail to AT&T’s particular statements as shown below.
4. With regard to the section entitled “PARTIES”: paragraphs 1 and 2 require no response from dPi.
5. The allegations set forth at Paragraph 3 of the Complaint are admitted.
6. With regard to the section entitled “DPI’S BREACH OF ITS INTERCONNECTION AGREEMENT(S)”and responding to the allegations set forth in Paragraph 4 of the

Complaint, dPi admits that in 2003 it entered into an interconnection agreement with AT&T and purchased telecommunications services pursuant to that agreement. Except as expressly admitted herein, the remaining allegations of Paragraph 4 of the Complaint are denied.

7. Responding to the allegations set forth in Paragraph 5 of the Complaint, dPi admits that in 2007 it entered into an interconnection agreement with AT&T and purchased telecommunications services pursuant to that agreement. Except as expressly admitted herein, the remaining allegations of Paragraph 5 of the Complaint are denied.
8. dPi denies the allegations set forth in Paragraph 6 through Paragraph 9 of the Complaint and demands strict proof thereof.
9. With regard to the section entitled “DPI’S ERRONEOUS REASONS FOR NONPAYMENT” dPi denies the allegations set forth in Paragraph 10 of the Complaint to the extent that it assumes that an unpaid balance is owed by dPi to AT&T.
10. dPi denies the allegations set forth in Paragraphs 11 and 12 of the Complaint.
11. Paragraph 13 of the Complaint purports to quote (or summarize) federal statutes. dPi respectfully refers the Commission to such statutes for their contents, and denies any inconsistent characterizations or allegations.
12. dPi denies the allegations set forth in Paragraph 14 of the Complaint.
13. Paragraphs 15 and 16 of the Complaint purport to quote (or summarize) federal statutes. dPi respectfully refers the Commission to such statutes for their contents, and denies any inconsistent characterizations or allegations.
14. The allegations set forth in Paragraph 17 of the Complaint, relating to “JURISDICTION”, are admitted.

15. In response to the “REQUEST FOR RELIEF” section, dPi denies that AT&T is entitled to any relief whatsoever.

**AFFIRMATIVE DEFENSES**

16. AT&T has failed to state a claim upon which relief can be granted.
17. AT&T’s claims are barred by the doctrines of unclean hands, laches, forbearance, estoppel, and waiver.
18. AT&T’s claims are barred by the statute of limitations.
19. AT&T has (or had) a contractual obligation to pursue, escalate, and preserve its claim to the promotional credits AT&T seeks to retract from dPi in its Complaint in accordance with the applicable provisions of the parties’ ICA(s). Upon information and belief, AT&T failed to do so. Accordingly, AT&T should be barred from pursuing its claims that it failed to contractually preserve.
20. AT&T has violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) by failing to provide Respondent with the appropriate resale promotion credit, and by failing to obtain Commission approval before placing restrictions on resale.
21. AT&T’s claims are barred and/or preempted, in whole or in part, by federal laws and regulations, including (without limitation) 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b).
22. The FCC has primary jurisdiction over all or part of AT&T’s claims.
23. AT&T’s claims are barred, in whole or in part, by its failure to mitigate any damages allegedly sustained.
24. AT&T’s right to recover, if any, is offset in whole or in part, for the reasons stated in

dPi's counterclaim.

25. dPi asserts the right to attorneys' fees after successful defense of this matter to the extent allowed under the terms of its Interconnection Agreements with AT&T and/or applicable law.
26. dPi reserves the right to amend this answer to add other affirmative defenses which are determined to be applicable upon discovery in this case.

#### **dPi's COUNTERCLAIM**

27. AT&T seeks a determination that, if it is required to extend cash back promotions to CLECs at all, then it should not be required to extend to CLECs the entire amount of the promotion, but rather a lesser amount derived by reducing the promotional amount by the resale discount. Upon close examination, AT&T's contention is incorrect and incompatible with the requirements of the FTA, harms competition, and should be repudiated. To comply with the law, the Commission should properly require AT&T/BellSouth to provide the full amount of the cash back promotions to CLECs.
28. The overarching purpose behind the FTA's resale provisions is to permit CLECs to purchase, for subsequent resale, services from the ILEC at a *lower* rate than the ILEC sells those services at *retail*. In short, *wholesale* should always be *less* than *retail*.
29. The flaw in AT&T's position is dramatically illustrated by the promotions in question, where applying the formula advanced by AT&T results in a situation where the cash back promotion reduces the *retail* sale price of the offer in question to a point where it is *lower than* the *wholesale* price. An easy hypothetical example showing the effect of applying AT&T's method is shown in Figure 1, below:

**Figure 1.**

**Comparison of Results of applying AT&T's proposed method for calculating promotion amount due resellers to (applying hypothetical 20% wholesale discount to both tariff price and to promotional price).**

<b>Standard/Tariffed price</b>	<b>Special/promotional retail cash back offer</b>	<b>Net retail price</b>	<b>Net wholesale price</b>
\$50	\$0	\$50	\$40
\$50	\$50	\$0	\$0 (retail now same as wholesale)
\$50	\$100	\$-50	\$-40 (retail now LESS than wholesale)

30. Obviously, adopting a model which results in the wholesale price that is no longer less than the retail price guts the purpose of the FTA and dooms competition. Accordingly, AT&T's model cannot be correct.

31. The appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost discount, then subtract the avoided cost from the actual sales price. *See* 47 USC 252(d)(3).<sup>1</sup> At the times when these resale agreements were first built in 1996 and 1997, the avoided cost (and thus the wholesale discount) was calculated upon the ILECs' standard tariffed pricing, at the time still regulated. The calculations were *not* based

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1

**47 USC 252(d)(3): Wholesale prices for telecommunications services**

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

on promotion prices, which did not then exist, and which in any event by definition are not standard prices, but the equivalent of a special sale price. To determine the avoided cost, one multiplies the resale discount factor times the tariffed price. *This gives one the base amount of the avoided cost, and thus the amount by which the wholesale amount should be lower than the retail price.* Obviously, there will always be *costs* to providing service, regardless of what the *sales price* is, and although initially formulated as a percentage to avoid recalculating the costs as tariffed rates rose, the avoided cost is best considered a fixed amount of the *standard, or tariffed*, rate.

32. Since the actual sales price is not necessarily the tariffed price, but can be lowered by short term “promotional” offers, *i.e.*, special sales, the FCC has required ILECs to make the benefits of those promotions available to CLECs.<sup>2</sup> The FCC has discussed the promotion issue at length in various dockets, notably including *Local Competition Order*.<sup>3</sup> Indeed, in the *Local Competition Order* the Commission expressly recognizes that ILECs could use promotions like AT&T’s to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the Commission found that the resale requirement of section 251(c)(4) of the Act

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**47 C.F.R. § 51.605 Additional obligations of incumbent local exchange carriers.**

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale **at wholesale rates** ....

3

*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) (“Local Competition Order”).



*makes no exception for promotional or discounted offerings*, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted)(emphasis added).

33. Consequently, the *price* to which the avoided cost discount is applied is simply the lower of the tariffed standard price, or, if any, the promotional price in effect for the services in question. Stated another way, the three steps to finding the wholesale price are:

- STEP 1: Find the retail price in the tariff.
- STEP 2: Multiply the standard tariffed retail price by the wholesale discount factor. This gives you the value of the avoided costs.
- STEP 3: Subtract the avoided cost from the retail sales price, which is standard tariffed price, or, if a promotion applies, the price after applying the promotion.

The results of using this method are shown below in Figure 2. Note that by using this method, the wholesale price is always the same amount less than the retail price, which is a better reflection of the fact that the cost to provide the services is constant regardless of what the sales price turns out to be.

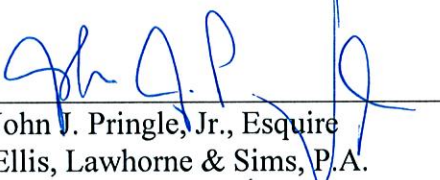
**Figure 2.**

**Comparison of results of applying just avoided cost discount based on standard/tariffed retail price**

<b>Standard/Tariffed price</b>	<b>Special/promotional retail discount</b>	<b>Net retail price</b>	<b>Net wholesale price</b>
\$50	\$0	\$50	\$40 (avoided cost is \$10)
\$50	\$50	\$0	\$-10 (wholesale still \$10 less than retail)
\$50	\$100	\$-50	\$-60 (wholesale still \$10 less than retail)

34. Because dPi has consistently been credited not the full amount of the promotions to which it is entitled, but instead by that amount less the wholesale discount, dPi is entitled to recover the difference, and hereby pleads for the same.

WHEREFORE, having responded to the Complaint, dPi respectfully requests that the Commission issue an Order dismissing the Complaint, granting DPI all relief available pursuant to its Counterclaim, and granting such further relief as dPi is entitled to in law and equity.

  
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Attorneys for dPi Teleconnect, L.L.C.

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2010-18-C

IN RE:

BellSouth Telecommunications, Inc.  
d/b/a AT&T Southeast d/b/a AT&T  
South Carolina, Complainant/Petitioner  
v. dPi Teleconnect, LLC,  
Defendant/Respondent

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**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the **Answer and Counterclaims of dPi Teleconnect, LLC** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

**VIA ELECTRONIC MAIL SERVICE**

C. Lessie Hammonds, Esquire  
Office of Regulatory Staff  
Legal Department  
PO Box 11263  
Columbia SC 29211

**VIA ELECTRONIC MAIL SERVICE**

Patrick W. Turner, Esquire  
**BellSouth Telecommunications, Inc.**  
1600 Williams Street  
Suite 5200  
Columbia SC 29201



Carol Roof  
Paralegal

February 25, 2010  
Columbia, South Carolina